(6) (6)

Nos. 85-621 and 85-642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

COMMODITY FUTURES TRADING COMMISSION,
Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

CONTICOMMODITY SERVICES, INC.,
Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

Of Counsel:
H. BARTOW FARR III
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

LESLIE J. CARSON, JR.
1004 Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 568-1587
Attorney for Respondents

WILSON - E

53146

QUESTIONS PRESENTED

1. Whether the Commodity Exchange Act, before the 1983 Amendments, gave the Commodity Futures Trading Commission subject matter jurisdiction to hear counterclaims based entirely on a state common law cause of action.

2. Whether, if the Act did confer such jurisdiction, that grant of power over state law claims violates Article III of the Constitution under the principles of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

3. Whether a party to a proceeding before the Commission may confer jurisdiction, otherwise barred by Article III, by consent and, if so, whether respondent consented here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Nos. 85-621 and 85-642

COMMODITY FUTURES TRADING COMMISSION,
Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

CONTICOMMODITY SERVICES, INC.,
Petitioner,

v.

WILLIAM T. SCHOR, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

STATEMENT

The issue in this case is whether the Commodity Futures Trading Commission (the "Commission") may exercise jurisdiction over a counterclaim arising solely under state law. The Commission entered judgment on such a counterclaim in this case against respondents

("Schor") and in favor of petitioner Conticommodity Services, Inc. ("Conti"). The court of appeals, finding lack of jurisdiction, reversed.

The facts are set forth in the court of appeals' opinion and need not be repeated in detail here. Commission Pet. App. 9a-14a. In brief, Schor opened accounts with petitioner Conti, a futures commission merchant, for the purpose of trading in financial futures.[1] Approximately three years later, in October 1979, following a disagreement between the parties, petitioner Conti liquidated those accounts. After liquidation, the accounts showed a debit balance. *Id.* at 11-12a.

In February 1980, Schor filed a reparations complaint with the Commission seeking to recover for trading losses suffered while a customer of petitioner Conti.[2] Conti then filed counterclaims, based not upon the Act but upon state law, for the debit balances in the accounts.[3] Schor challenged the jurisdiction of the Commission over the counterclaims, arguing that the Act provided no authority to adjudicate claims arising under state law. *Id.* at 37a.

The Administrative Law Judge issued an initial decision denying Schor's claims and awarding judgment to Conti on his counterclaims. The Judge remarked that the challenge to jurisdiction over the counterclaims raised "a neat legal point" but that he was "bound by agency regulations and published agency policies." *Id.*

---

[1] "Financial futures are contracts to buy or sell interest-bearing investments on a fixed future date." Commission Pet. App. at 10a n.2.

[2] The complaint alleged violations of the Commodity Exchange Act and various regulations promulgated thereunder.

[3] Although Conti had previously filed an action in federal court for these balances, it chose to dismiss that action voluntarily. *Id.* at 13a n.6. Respondents had opposed the federal action on the ground, *inter alia*, that it should have been brought before the Commission.

at 62a-63a. The Commission then allowed the decision to become final. It made no reference to the question of jurisdiction over common law claims.

The court of appeals reversed. Having raised *sua sponte* the question whether the Commission could decide state claims consistently with Article III of the Constitution, the court found that such an exercise of jurisdiction would give rise to serious constitutional questions. *Id.* at 21a, 40a-41a. In reaching this conclusion, the court placed particular reliance on the decision in *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982), where this Court held that non-Article III bankruptcy judges could not exercise jurisdiction over common law claims against the will of a party. The court of appeals concluded that the filing of his own reparations complaint before the Commission was not sufficient "consent" by Schor to justify an exception to the principles established in *Northern Pipeline*.

The court of appeals, however, did not rest its decision on constitutional grounds. Rather, it examined the Act to determine "whether a construction of the statute is fairly possible by which the [serious constitutional] question may be avoided." *Id.* at 21a. Reviewing the Act and its legislative history, the court found no clear evidence that Congress intended to confer jurisdiction over common law claims. *Id.* at 41a-49a. Indeed, noting that Congress had not conferred similar jurisdiction upon other administrative bodies, the court said that the position taken by the Commission, if upheld, would give it "unprecedented authority." *Id.* at 48a. The court thus construed the Act "to authorize the [Commission] to adjudicate only those counterclaims alleging violation of the Act or Commission regulations." *Id.*

This Court vacated that judgment, remanding for reconsideration in light of *Thomas* v. *Union Carbide Agri-*

cultural Products Co., 105 S.Ct. 3325 (1985). The court of appeals, observing that *Thomas* "arose entirely within the confines of federal law, and that a federal rule of decision, exclusively, was at stake," Commission Pet. App. at 4a, reinstated its judgment on remand.

SUMMARY OF ARGUMENT

I. The Commodity Exchange Act, 7 U.S.C. (and Supp. II) 1 *et seq.*, does not give the Commission the power to adjudicate state-law counterclaims. As the court of appeals pointed out, the grant of such jurisdiction would be a remarkable departure from the practice followed by Congress with regard to other federal agencies. Commission Pet. App. at 47a-48a. In addition, it would place the agency in the position of awarding or denying relief solely according to state law, a position of unusual sensitivity in our federal system. Before the Commission is allowed to assume such jurisdiction, therefore, the intent of Congress to confer it should be clear.

That intent is anything but clear here. Although the Act speaks of counterclaims, it gives no indication that the term was meant to include counterclaims outside the scope of the Act itself. Indeed, while representatives of the commodity industry pressed Congress to delineate the power of the Commission over counterclaims, Congress declined to do so. The Commission, in its own proposed regulations, recognized that its authority over non-Act counterclaims was doubtful. In view of these mixed indications, the grant of power to the Commission should be narrowly construed.

A narrow construction of the Act is even more appropriate because it avoids the constitutional problems raised by petitioners' position. If Congress did intend to confer jurisdiction over state-law counterclaims, that grant of power is prohibited by Article III of the Constitution. This Court has frequently held that the federal courts

should "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question can be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The same principle can and should be followed here.

II. Article III prohibits Congress from giving the Commission the power to decide state-law counterclaims. Those claims were within the "pre-existing" jurisdiction of the state courts at the time that Article III was drafted, and they must be decided either by Article III courts or by state courts.

The history of Article III makes this clear. Unlike the grant of judicial power over federal claims, the decision to extend federal jurisdiction to state-law claims met with considerable opposition. The principal basis for objection was that the exercise of federal jurisdiction would seriously devalue the authority of state courts in commercial and other traditional state-law actions. Although this concern gave way in the final version of Article III, the granting of power in diversity cases was justified largely on the basis of the greater independence and competence of judges protected by the tenure and salary provisions of Article III, Section 1. Because members of the Commission lack just such protection, it would be inconsistent with the understanding inherent in Article III to give them a share of the federal judicial power over state-law claims.

The cases decided by this Court fully support that conclusion. In the only case directly addressing the authority of a non-Article III tribunal over state-law claims, the Court held that the tribunal lacked such authority. *Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982) (*Northern Pipeline*) (Article I bankruptcy court); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Although the Court has held upon occasion that an alternative tribunal may decide cases

within the federal judicial power conferred by Article III, those cases did not involve questions of state law within the pre-existing jurisdiction of state courts and, as a consequence, did not present the unusual problems arising from the exercise of federal power over state matters. See, e.g., *Thomas* v. *Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325 (1985); *Palmore* v. *United States*, 411 U.S. 389 (1973); *Crowell* v. *Benson*, *supra*. Thus, whatever power Congress may have to establish alternative tribunals to define and apportion federal rights, that power does not extend to the creation of a third system of courts with jurisdiction over state claims.

These principles cannot be set aside in this case because of "consent" of the parties. This Court has held that, as with other jurisdictional constraints, the parties cannot consent to an impermissible adjudication by a non-Article III judge. See *Glidden Co.* v. *Zdanok*, *supra*. In any event, there was no consent here. Respondent objected to the exercise of jurisdiction over the state-law counterclaim, and Article III requires that the objection be honored.

ARGUMENT

I. The Court Of Appeals Below Correctly Held That The Commodity Exchange Act Does Not Authorize Reparations Awards On State-Law Counterclaims.

The court of appeals correctly concluded that section 14 of the Commodity Exchange Act, 7 U.S.C. § 18 (the Act), prior to its amendment in 1983, did not authorize the Commission to entertain state common law counterclaims.[4] As the court found, any other construction would raise serious constitutional questions under Article III. Commission Pet. App. at 21a, 40a-41a; see pages 16-43

[4] Although we believe that the Commission lacks jurisdiction following the 1983 Amendments as well, the Court need not address that issue in this case.

infra. But, even if concerns about Article III were not present, the Act still cannot be read as expressing the intent of Congress to confer this remarkable authority on the Commission.

Petitioners do not dispute that the jurisdiction asserted by the Commission over state-law claims is highly unusual. As the court of appeals pointed out, Commission Pet. App. at 47a-48a, the Commission has conceded in this case that it "is not aware of any other agencies that expressly render decisions and issue awards on common law claims." Under these circumstances, the court observed that it "would be extraordinary for a legislature to deliver such a [jurisdictional] blank check to an administrative tribunal." *Id.* In our view, a clear showing of Congressional intent must be required to support such an "extraordinary" action, particularly where the result is to place an administrative agency in the middle of disputes decided solely by reference to state law. See generally *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371 (1985) (Congressional intent to preempt state law must be clear).

There is no clear evidence of that intent here. Petitioners' main contention is that, since the Act and its legislative history contain references to counterclaims, Congress must have intended to confer jurisdiction over non-Act counterclaims. But this analysis only begs the question. The issue is not whether Congress envisaged counterclaims but whether it contemplated and intended *non-Act* counterclaims. On that issue, the Act and legislative history point, if anything, in the opposite direction.

To begin with, we note that the focus of the Act is unmistakably on claims arising under its provisions. At the time that this claim arose, Section 14 of the Act limited reparations awards to those caused by violations of the Act, not once but three times. In Section 14(a), it limited applications to the Commission to those "com-

plaining of any violation of any provision of this chapter or any rule, regulation or order thereunder by any person who is registered or required to be registered under [the Act]." 7 U.S.C. (1976 ed.) § 18(a). In Section 14(c), it required the Commission to "determine whether or not the respondent has violated any provision of this chapter or any rule, regulation or order thereunder." 7 U.S.C. (1976 ed.) § 18(c). And, in Section 14(e), it authorized the Commission to "determine the amount of damage, if any, to which such person is entitled as a result of such violation" if "the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation or order thereunder." 7 U.S.C. (1976 ed.) § 18(e). Thus, it seems evident that Congress was concerned mainly with providing relief under the Act itself, not with resolving all possible disputes between customers and registrants.

As a related matter, we also note that the overriding aim of the legislation was to afford a remedy for customers against registrants, rather than vice-versa. The Commission itself has recognized as much. In *Friedman v. Dean Witter and Company, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21, 307 (CFTC) (1981), while holding that its current counterclaim regulation was valid, the Commission stated: "Clearly, reparations was designed primarily as a forum in which customers might vindicate grievances against commodity professionals where violations of the Act and regulations are involved, *and not for debit balance collection at the behest of commodity professionals.*" *Id.* at p. 25,538 (emphasis supplied).

Although petitioners correctly note that Section 14(d) (now relettered as Section 14(c)) referred to counterclaims against non-resident complainants, and that Sections 14(f) and (g) [7 U.S.C. (1976 ed.) § 18(f) and (g)] referred to proceedings by "any person" and "any

party," those general references shed no light on Congressional intent regarding *non*-Act counterclaims. This ambiguity is perhaps best illustrated by the fact that, despite this language, the Commission itself identified at least a "substantial question" about its authority to entertain counterclaims not based on violations of the Act. 40 Fed. Reg. 55,667 (1975) . Thus, over a decade ago, the Commission regarded the question of its jurisdiction over non-Act counterclaims as so questionable that it first proposed regulations limiting its jurisdiction to counterclaims based on complainants' violations of the Act and brought against persons required to register under the Act. 40 Fed. Reg. 55,666-55,667 and 55,672-55,673 (1975).[5]

The Commission had good grounds for its early doubt that Congress intended to give it jurisdiction over non-Act counterclaims.[6] When the Act was under considera-

---

[5] Although the Commission now suggests that counterclaims under the Act "virtually never arise," Commission Br. at 23, its view has not been constant. In its original proposed counterclaim regulation, the Commission obviously recognized there could be counterclaims under the Act; that regulation would have restricted counterclaims to those based on the Act. 40 Fed. Reg. 55,666-55,667 and 55,672-55,673 (1975). Indeed, as recently as August 20, 1985, the Commission recognized the existence of counterclaims under the Act when it limited its stay of reparations proceedings because of the court of appeals' decision here to those "in which counterclaims *that do not allege a violation of the Act* or the Commission's regulations have been filed . . ." (Emphasis supplied.) *In the Matter of Various Reparations Proceedings in Which Counterclaims Have Been Filed,* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,674 (August 20, 1985).

[6] The administrative law judge in this case also seemed to find the issue troubling. In the Initial Decision in this case, while addressing respondents' argument that the Act empowers the Commission to award damages only for a violation of the Act and that allowing non-Act counterclaims is *ultra vires,* Administrative Law Judge Painter stated: "This may be a neat legal point. However,

tion, representatives of the commodity industry advocated that Congress delineate the scope of permitted counterclaims. Congress, however, declined to do so. *Commodity Futures Trading Commission Act of 1974: Hearings On H.R. 11955 Before the House Comm. on Agriculture*, 93 Cong., 2d Sess. 97, 169 and 254 (1974). Thus, in spite of this apparently unanimous plea by the industry, Congress in 1974 decided not to state in the Act or elsewhere that non-Act counterclaims were to be entertained by the Commission. This steadfast silence continued in the 1983 Amendments even though the question of jurisdiction had been raised both in this case and in *Friedman v. Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at 25,538 (Nov. 13, 1981).[7]

Although petitioners argue that statements at the time of the 1983 Amendments support their position, that argument has several weaknesses. In the first place, this Court has stated and reiterated that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. *Russello v. United States*, 464 U.S. 16 (1983); *Jefferson County Pharmaceutical Assn. v. Abbott Laboratories*, 460 U.S. 150, 165, fn. 27 (1983); *United States v. Price*, 361 U.S. 304 (1960). Views in-

---

an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims." Commission Pet. App. at 62a-63a.

[7] One obvious reason that legislatures omit words from a statute is that the statute would not otherwise have passed. *See generally Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974) (deletion of provision from bill is strong indication of Congressional intent). No one can say here that a provision in Section 18 of the Commodity Exchange Act, expressly authorizing non-Act counterclaims, would have been approved. What can be said is that the legislation and its history gave no notice to members of Congress who voted on it that such authority was included. For that reason alone the Court should let Congress express unequivocally its intent to confer this unprecedented authority.

ferred from the silence of a later Congress presumably are even more hazardous.[8]

The history cited is also unpersuasive. For example, the Commission brief points to language in the legislative history of the 1983 amendments, stating that the reparations program seeks to decide the entire controversy including counterclaims. Yet, in the same report, the Senate Committee states, with reference to the rulemaking provisions of the 1983 amendments, that "[t]hese provisions, however, do not absolve the Commission from complying with the parties' due process and other rights under the Constitution." S. Rep. No. 384, 97th Cong., 2d Sess. 48 (1982). If anything, therefore, this history suggests that Congress was wary of exceeding the constitutional limits of agency power.

The government also relies upon a 1983 provision authorizing the Commission to terminate a customer's trading privileges for non-payment of a broker's counterclaim. Again, however, this provision makes no mention of non-Act or state-law counterclaims. Furthermore, it imposes a sanction on a customer equal to the sanction imposed on a broker for violating the Act. If the Commission were correct, therefore, this provision would convert a reparations procedure established to enforce compliance with the Act into a new method of enforcing pay-

---

[8] Indeed, in one case, the Court found that agency action was beyond its statutory charter despite longstanding consistent agency construction, Congressional reenactment of the questioned language, and *express Congressional Committee approval of the agency construction. SEC v. Sloan*, 436 U.S. 103 (1978). The Court found all this overcome by the wording of the Act, the pattern of the statute as a whole, and the unusually broad power that a contrary interpretation would vest in the agency. Here, unlike *Sloan*, the agency construction has not been consistent and there has been no express Congressional approval of state-law counterclaims. Moreover, the power sought by the Commission here would be unusual and would raise troubling constitutional questions.

ment of ordinary debts owed by customers to brokers. Nothing in the 1983 Amendments suggests that Congress had that sort of collection procedure in mind.[9]

Read against this background, the materials cited by petitioners are, at their strongest, inconclusive. As the court of appeals noted, "cryptic" references to counterclaims or broad provisions relating to "any party" are far from "compelling" indications that Congress meant to go as far as petitioners insist. Commission Pet. App. at 42a-43a. Given that a construction limiting jurisdiction to counterclaims under the Act is "also sensible," and given that such a construction does not create novel agency authority over state-law matters, it was entirely appropriate for the court of appeals to decide to read the statute narrowly. Indeed, we think that this would be the proper course regardless of any possible constitutional problems caused by a contrary reading.

It is all the more advisable, however, when those constitutional problems are taken into account. As this Court held in *Crowell v. Benson, supra*: "When the validity of an act of the Congress is drawn in question, and if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that

[9] Where Congress intended to validate a Commission policy, and expand coverage of the Act, it took pains to do so openly. Thus, in the 1978 amendments it amended Section 14(a) of the Act to expand the class of persons against whom a reparations complaint could be filed by substituting the words "who is registered or required to be registered" for the word "registered." Pub. L. 95-405, § 21(1), 92 Stat. 875 (1978). The legislative history commenting on this amendment states that its purpose was "to make it clear that reparations proceedings may be brought against any person who is registered, or who is required to be registered, under the Act * * *. This provision is consistent with the Commission's decision in *Stucki v. American Options Corp.* [citation omitted]." 1978 U.S. Code Cong. & Ad. News 2126.

such a construction is permissible and should be adopted in the instant case." 285 U.S. at 62. This Court has applied the same cardinal principle in many other instances as well. E.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Lynch v. Overholzer*, 369 U.S. 705 (1962); *Ashwander v. TVA*, 297 U.S. 288 (1936).

This case is particularly appropriate for application of this rule. Not only is there a serious constitutional question raised by petitioners' construction of the statute, but that construction provides the Commission with a different (and grander) jurisdictional reach than other agencies enjoy. Thus, to uphold that construction, it is necessary to find both that Congress intended such an expansive grant *and* that it did so in the face of strong constitutional barriers posed by Article III. Nothing in the Act or legislative history speaks with sufficient force to justify that conclusion.

The Commission argues, however, that the authority to adjudicate state-law counterclaims is necessary to preserve the reparations program. As an initial matter, we note that it has offered no statistics or other evidence to support that conclusion. In its present Brief and in its two Petitions for Certiorari in this case, the Commission informed the Court that 8,000 reparations claims have been filed since 1975, but it has never stated how many involved state-law counterclaims. Commission Pet. at 9. However, in its order indicating that it would continue to process counterclaims despite the court of appeals' decision in this case, the Commission specified only sixty cases involving counterclaims docketed from 1980 through the date of the order, September 10, 1984. See *In the Matter of Various Reparations Proceedings in Which Counterclaims Have Been or in the Future are Filed*, 1 Comm. Fut. L. Rep. (CCH) ¶ 22,352. Even if this figure is understated, it nevertheless suggests

that the great majority of reparations cases do not involve state-law counterclaims at all.

Whatever the precise numbers may be, however, the presence or absence of jurisdiction over state-law counterclaims does not greatly change the situation confronting customers trying to decide whether to proceed in reparations, or in court or arbitration. See 17 C.F.R. § 180.1 *et seq.* Even before the decision in this case, brokers could and did file their state law claims in court; they will presumably continue to do so as long as they consider such a course advantageous. In fact, the Commission's own policy, set forth in footnote 15 at page 26 of its Brief, seems to encourage brokers to sue in court for debit balances. According to that footnote, the Commission will stay any case where the broker has previously filed a claim for a debit balance and the claim is pending in a court with a compulsory counterclaim rule. See *Howard v. J. C. Bradford & Company*, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,393 (1984). Thus, a broker can prevent consideration by the Commission of any reparations claim merely by filing a debit balance claim in a court with a compulsory counterclaim rule. The availability of this preemptive tactic seems to reduce the importance of the reparations program, particularly with respect to debit balance counterclaims.

We also point out that, as matters currently stand, the decision of the Commission to adjudicate state-law counterclaims works to the disadvantage of the customers for whose benefit the reparations program was established. Those customers are now discouraged from using it where there is a possibility of a state common law debit balance counterclaim, not because the broker can file its claim in court, but because, as in this case, the Commission will not permit a state common law defense to be raised to the counterclaim. Nor, apparently, will it permit the petitioner to raise a state-law claim for

damages *against* the broker. Here, Schor and MSA raised both a state common law defense and a state-law claim, without any acknowledgment by the Administrative Law Judge or by the Commission on their Application for Review. See Complainant's Reply Brief, Court of Appeals Record, Appendix 806; Applications for Review, Court of Appeals Record, Appendix 900-902 and 927D-927F.[10] Thus, the jurisdiction asserted by the Commission is, at best, incomplete and, at worst, prejudicial to the principal beneficiaries under the Act.

Finally, petitioners argue that the decision below will lead to imbalances resulting from dual proceedings. This concern, however, is overstated. In many cases, as now, the claims will be heard together in federal court. But, even if two proceedings do go forward separately, the Commission can use its powers to obviate any difficulty resulting from that situation. For example, by exercising its authority to regulate registrants under the Act, it can direct them not to pursue court proceedings for a deficit balance to judgment until pending reparations proceedings are concluded. Or, it can direct registrants to give credit for any reparations awarded against them. And, it can direct that customers give credit on any Commission reparations awards for any state or federal court award on an account deficit.

When all is said and done, the real concern of the government here would seem to be that expressed in its brief on pages 27 and 28. There, we are advised that consideration "is now being given to the possible creation of non-Article III forums for the adjudication of the

---

[10] Indeed, in its Supplemental Brief in the Court of Appeals, the Commission expressly disavowed remarks of its counsel at prior oral argument in the following words: "Any suggestion by Commission counsel at oral argument that the Commission has, or necessarily would, entertain non-Act claims asserted by customers in response to non-Act counterclaims was incorrect." Commission Supplemental Brief in the Court of Appeals, p. 18, fn. 14.

multitude of claims that arise in connection with federal programs and that otherwise would have to be litigated, at great expense and burden, in Article III Courts." It is not immediately clear that this plan will be unavoidably sidetracked if agencies are not given power over state-law claims. But, in any event, the Commission does not explain why dispute resolution in Article III courts must always be expensive and burdensome compared to non-Article III forums. There is no necessary cause-and-effect relationship between having a forum presided over by an official who is as independent of outside influence as life tenure and salary protection can make him, and the burden and expense to litigants in that forum. Economy is not prohibited by Article III; a dependent judiciary is. Even within the confines of Article III, Congress can take significant steps to reduce the burdens on the federal courts. See page 43 *infra*.

In short, the Commission need not have a unique jurisdiction over state-law counterclaims in order to carry out its role under the Act. Because its attempt to assume that jurisdiction goes beyond any clear directive from Congress, that attempt should be held to be beyond its statutory authority.

II. Article III Bars A Grant Of Jurisdiction To The Commission To Adjudicate State-Law Claims.

If the Court concludes that Congress intended to grant the Commission jurisdiction over state-law claims, the remaining question is whether that grant of jurisdiction is consistent with Article III of the Constitution.[11]

[11] Article III, § 1 provides that judges of the federal courts established pursuant to that Article "shall hold their Offices during good Behaviour, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Section 2 provides that "[t]he judicial Power shall extend" to certain enumerated classes of cases, including suits "between Citizens of different States."

In our view, it plainly is not. Both the history of Article III and the decision of this Court in *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, *supra*, demonstrate that the federal power over state-law claims—a power that was given only with great apprehension and largely because of the independence of federal judges—cannot be exercised by agencies like the Commission.[12]

A. Congress May Not Depart From the Understanding Inherent in Article III That Federal Judicial Power Over State Law Claims Would Be Exercised By Independent Judges.

a. Although six Justices of this Court indicated in *Northern Pipeline*, *supra*, that assignment of common law claims to alternative tribunals raised special constitutional problems, petitioners appear to treat state and federal claims as essentially fungible for purposes of Article III analysis. In our view, this approach is at odds with both the history of Article III and the teachings of this Court. As Justice Frankfurter has observed, "[i]n the compromise of federal and state interests leading to distribution of jealously guarded judicial power in a federal system . . ., it is obvious that very different considerations apply to cases involving questions of federal law and those turning solely on state law." *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 474 (1957) (Frankfurter, J., dissenting).

Those different considerations are fully evident in the debates surrounding the adoption of Article III. From the beginning, there was no serious question that the National Government should include a judicial branch. See Hart and Wechsler, *The Federal Courts and the Federal System* 4 (1973 ed.), citing Farrand, The Framing of the Constitution 79 (1913) ("[t]hat there should

[12] As we discuss at pages 38-42 *infra*, these principles cannot be, and have not been, rendered inoperative by "consent" of the parties.

be a national judiciary . . . was readily accepted by all"). Nor was there any extended dispute about the jurisdiction of federal courts over federal laws. See Hart and Wechsler, *supra*, at 13-14. A proposal to extend the federal judicial power to "all cases arising under laws passed by the Legislature of the United States" was, aside from minor changes in wording, "accepted and incorporated into the Constitution without further question or discussion." *Id.* at 14. It aroused no controversy during the process of ratification.[13]

There was no such ready acceptance of federal jurisdiction over state-law claims. Far from being thought a natural part of federal judicial power, "[t]he grant of diversity jurisdiction aroused bitter controversy in the ratification debates . . . ." Hart and Wechsler, *supra*, at 18; see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1928). As Justice Frankfurter observed, "[t]he diversity jurisdiction of the federal courts was probably the most tenuously founded and most unwillingly granted of all the heads of federal jurisdiction which Congress was empowered by Article III to confer." *National Mut. Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 650-51 (1949) (dissenting opinion); see also 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3601, at 337-38. This controversy was intensified by the expectation that the federal power would be exercised by inferior courts located throughout the Nation.[14]

---

[13] Although this grant of judicial power was essentially uncontested, Congress did not provide lower federal courts with general federal-question jurisdiction for nearly 100 years. See *Palmore v. United States*, *supra*, 411 U.S. at 400-02.

[14] Quite apart from concerns about diversity jurisdiction, opponents of a strong federal judiciary sought to deter the creation of inferior federal courts. See Hart and Wechsler, *supra*, at 21. It is by now well-recognized that Congress has the power, but is not required, to establish such courts. *Palmore v. United States*, *supra*, 411 U.S. at 401.

The strongest objection to giving the federal courts extensive judicial power was that they would preempt or, as a practical matter, absorb the state courts. See Friendly, *supra*, at 487-490. Although such dire predictions proved overblown, they are nonetheless relevant here because of the response that they provoked. Describing what he saw as the proper relationship between federal and state judicial powers, see *The Federalist* No. 82, at 491 (C. Rossiter ed. 1961), Hamilton drew a pointed distinction between cases traditionally within state competence and cases arising out of the authority granted in the new Constitution. Although Article III itself made no distinction between the two classes of cases, Hamilton argued that the former would necessarily be subject to concurrent federal and state jurisdiction while the latter might (but need not) be confined solely to federal courts: "But this doctrine of concurrent jurisdiction is only clearly applicable to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the Constitution to be established; for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgement of a pre-existing authority." *Id.* at 493 (emphasis in original). This approach demonstrates that, from the outset, there was a special sensitivity to the exercise of federal power over claims within the "pre-existing authority" of the state courts.[15]

---

[15] The counterclaim at issue in this case, despite its modern overtones, is very much the sort of claim that was within the authority of the state courts 200 years ago. It is, in essence, a claim upon a contract. The right to recover on the contract, if any indeed exists, arises from state law. Whether the suit is timely brought, whether the contract is binding, whether equitable defenses exist, are also issues to be decided by reference to state law. The decision of these issues would be confined to state courts but for the grant of judicial power in Article III.

The proposed grant of federal power, at least to inferior courts, was also met with the more restrained objection that it was unnecessary in light of the established system of state courts. While this argument again applied with some force to federal claims, it took on special weight with regard to suits based solely on state law. As one proponent of this view noted, "justice may be obtained in [state] courts on reasonable terms; they must be more competent to proper decisions on the laws of their respective states, than the federal states can possibly be. I do not, in any point of view, see the need of opening a new jurisdiction in these causes." Lee, *Letters of a Federal Farmer*, Ford Pamphlets on the Constitution, 277, 307 (1888), quoted in Friendly, *supra*, at 491-92. Others noted the obvious fact that state courts had been competently deciding "the common controversies of the people" for many years, an exercise of jurisdiction that did not have to change merely because of the advent of a National Government. See Friendly, *supra*, at 492.

The response to these arguments is once again relevant here. The principal objection to leaving certain cases within exclusive state jurisdiction was a perceived lack of independence on the part of state judges. With regard to federal cases, Hamilton observed: "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist* No. 81, at 481, 486. The concern with regard to diversity cases was even more severe, though for a more narrowly defined reason: the fear that judges would be beholden to local interests. As Hamilton stated, "[n]o man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens." *Id.* No. 80, at 475, 478.

The concern that state judges might be subject to political influence was hardly fanciful. As one commentator has noted, "[t]he method of appointment and the tenure of the [state] judges were not of the sort to invite confidence." *Id.* at 497. In many states, the judges were removable by action of the legislative or executive branch without any guaranteed length of service. *Id.* In other states, the judges were subject to election by popular vote. Protections against reductions in salary while on the bench were also inadequate. See *The Federalist* No. 79, at 472.

The federal judges authorized in Article III, by contrast, were to be given both life tenure and a minimum salary immune from reduction during their service. These provisions were meant to serve at least two purposes. Most importantly, they were intended to make federal judges free from political and other pressures. As Hamilton argued in *The Federalist* No. 78, at 470-471, "[t]hat inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission." In the following paper, he stated that, "[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." *Id.* No. 79, at 472.

The independence of the federal judges was not sought as an end in itself, but as a means to "secure a steady, upright, and impartial administration of the laws." *Id.* No. 78, at 465. Whereas judges subject to removal by the legislature or by popular vote might interpret the law with an eye to political approval, it was envisioned that federal judges would consult nothing but "the Constitution and the laws" themselves. *Id.* No. 78, at 471. This strict adherence to law, in turn, would provide assurance of a fair resolution "in cases in which the

State tribunals cannot be supposed to be impartial . . . ." *Id.* No. 80, at 478.

The provisions for tenure and fixed minimum salary had a second aim as well: to attract more competent judges. *Id.* No. 78, at 471-72. Hamilton observed that, "[t]o avoid an arbitrary discretion in the courts," it was important that federal judges "be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . ." *Id.* No. 78, at 471. Knowledge of those rules and precedents, however, would require long study by judges of exceptional ability. Without the incentives and protections offered by guaranteed tenure and salary, it was predicted that "the administration of justice [would be thrown] into hands less able, and less well qualified to conduct it with utility and dignity." *Id.* at 471-72.

In the end, these considerations prevailed over concerns that the federal courts would make needlessly great inroads on the work of the state courts.[16] With regard to diversity claims in particular, the drafters concluded that a grant of judicial power to federal courts was necessary to alleviate worries about biased or inadequate state courts.[17] In that limited class of cases, they accepted the unusual proposition that federal courts could

[16] The grant of power in Article III is, of course, limited to cases involving citizens of different states. See Art. III, Sec. 2. The jurisdiction asserted by the Commission is far broader, reaching to suits between citizens of the same state as well.

[17] As Chief Justice Marshall put it not many years later: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 87 (1809).

administer state law *more* reliably than state courts because of their greater competence and independence from political influence.

These justifications for federal power over state-law claims have little or no relevance to alternative tribunals like the Commission. It is conceded by all parties that members of the Commission have neither life tenure nor an irreducible salary. As provided by statute, they are appointed for a term of five years. At the end of that term, reappointment depends upon, first, the pleasure of the President (who must appoint) and, second, the consent of the Senate (which must confirm). In fact, the political affiliations of the commissioners play a role in the selection process because Congress has provided that "[n]ot more than three of the members of the Commission shall be members of the same political party." 7 U.S.C. § 4a. The Act provides no assurance against a reduction in salary during service. In short, members of the Commission have none of the guarantees of independence that are contemplated by Article III.

This lack of independence cannot be taken lightly. While we do not, of course, contend that any member of the Commission is actually biased in a particular case, the fact remains that they are subject to political pressure not faced by Article III judges. Thus, for example, an official seeking reappointment to another five-year term may be sensitive to criticism from an influential legislator whose constituents have been adversely affected by the decisions of the tribunal. Indeed, particular litigants or organizations, dissatisfied with such decisions, may lobby against reappointment on the ground that the official is too pro-industry or too pro-customer. Also, given the requirement that the Commission include persons having knowledge of futures trading and "the production, merchandising, processing or distribution" of commodities, 7 U.S.C. § 4a, other individuals or groups may press for the appointment of commissioners from a

different segment of the industry. The outcome of these efforts may well affect the outcome of state-law claims brought before the Commission.[18]

We also note that the commissioners, who need not be (and generally are not) lawyers, are unlikely to have any familiarity with the law of a particular state. While the initial decision in a suit before the Commission is rendered by an administrative law judge, the Commission has the statutory authority to revise it upon appeal. In reviewing a state-law claim, therefore, the commissioners are ultimately in the position of applying to the facts a body of law with which they can have, at most, a passing acquaintance. The possibility of erroneous judgments—or, for that matter, judgments based more on beliefs about the commodities industry than on knowledge of the governing law—is thus unavoidably increased.[19]

We think that these differences between the Commission and the regular federal courts are of constitutional significance. As the existence of Sections 1 and 2 together make clear, Article III is concerned not just with the fact of federal judicial power, but with the way in which it is exercised. Here, federal officials have assumed a power over state claims relinquished only most narrowly and reluctantly in Article III itself; yet, they

[18] It is true, of course, that members of the Commission are not subject to any particular influence by *state* legislators and voters. But that fact does not mean that the expectations of Article III have been satisfied. Nothing in the history of Article III suggests that the drafters of that provision intended to provide a choice between state judges possibly beholden to state officials and federal judges possibly beholden to federal officials. Indeed, in light of the concerns about federal judicial power in general, it seems likely that the possible influence of federal officials on state-law cases would have been viewed with even greater alarm.

[19] As we discuss later in this brief, the availability of an appeal to an Article III court does not cure this defect. See pages 37-38 *infra*.

have done so without having any of the qualities of independence and legal expertise that justified the grant of power in the first place. That diversion of the federal power over state-law claims is an affront to the principles embodied in Article III.

b. A proper respect for the limited reach of Article III over state-law claims is not an anachronism. To the contrary, this Court has expressed repeated concern about efforts to expand that jurisdiction at the expense of state interests.

The most pertinent example, of course, is the decision in *Northern Pipeline*, *supra*. There, a plurality of four Justices made clear that the power of Congress to create tribunals outside the scope of Article III was confined to three particular categories: territorial courts; tribunals for courts-martial; and tribunals to adjudicate "public rights." 458 U.S. at 63-77. The plurality noted that the recognition of this power "represent[ed] no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts." *Id.* at 64. Rather, it took account of narrow situations "in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." *Id.* The plurality concluded that "the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case," did not fall within any of those narrow situations. *Id.* at 71.

Justices Rehnquist and O'Connor, concurring in the judgment, also found the state-law nature of the claim to be significant. Noting that the claim involved matters that were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," *id.* at

90, the concurring Justices pointed out that "[t]here is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of [the plaintiff] arise entirely under state law." *Id.* Given the character of the claims, the concurring Justices found no need to review the prior Article III cases in full detail, observing that "[n]one of the cases ha[d] gone so far as to sanction the type of adjudication to which [the defendant] will be subjected against its will" under the congressional plan. *Id.* at 91.[20]

The same considerations should be controlling here. The counterclaim asserted by petitioner Conti arises "entirely under state law" and must be decided without benefit of any "federal rule of decision." By definition, there is nothing "exceptional" about the power of the Congress over that sort of contract claim: the notable thing about congressional power over state law is that it is largely nonexistent.[21] If the proper focus of inquiry is the power over commodities trading, that power seems even less exceptional than the power over bankruptcies at issue in *Northern Pipeline*—a power that is at least expressly mentioned in Article I. Although Congress may find it more convenient for the Commission to decide all claims having anything to do with commodities trading, the Court in *Northern Pipeline* correctly rejected arguments based upon mere convenience. As the plurality stated, the principles of Article III must be applied "in

---

[20] As we discuss below, see pages 38-42 *infra*, we do not believe that consent of the litigants is sufficient to alter the principles established in Article III. Even if it is, however, we think that respondent in this case was subjected to the jurisdiction of the Commission over the counterclaim "against [his] will."

[21] In proper circumstances, of course, Congress can preempt state law. The existence of that power does not mean, however, that Congress can treat state law rights as if they were federal rights for purposes of assigning disputes to particular tribunals. See pages 36-37 *infra*.

light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole." *Id.* at 64.

The *Northern Pipeline* case is the only decision of this Court directly addressing the power of Congress to give alternative tribunals jurisdiction over state-law claims. But, in *Glidden Co.* v. *Zdanok*, *supra*, at least several members of the Court gave implicit recognition to the idea that state-law claims had to be heard by Article III judges. There, Justice Harlan for a plurality of the Court found it necessary to decide whether a judge of the Court of Claims, sitting by designation on the Court of Appeals for the Second Circuit, was an Article III judge. In explaining the need for such an inquiry, he observed that "[t]he Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants." 370 U.S. at 537. Noting that "[a]uthority for the Federal Government to decide questions of state law exists only by virtue of the Diversity Clause in Article III," Justice Harlan concluded that "[f]or this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented." *Id.* at 537-538.[22]

Other cases, while less directly on point, have also treated federal power over state claims with great restraint. Starting with the propositions that the federal courts are courts of limited jurisdiction, and that certain limits are set as a constitutional matter by Article III, this Court has frequently made clear that even powers concededly given to the federal courts should be regarded as relatively inelastic. From early cases construing the extent of diversity jurisdiction (*Strawbridge* v. *Curtiss*, 3 Cranch (7 U.S.) 267 (1806)) to recent cases marking

---

[22] Although Justice Harlan wrote only for himself and Justices Stewart and Brennan, no member of the Court disagreed with this portion of the plurality opinion.

out the limits of ancillary jurisdiction (*Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978)), the Court has returned to the general principle that "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Id.* at 374.

Although these cases have commonly involved issues regarding the extent of the judicial power, rather than the form in which the power is exercised, they are nevertheless instructive about the delicate balance between state and federal interests that Article III represents. For example, this Court established almost immediately that a case brought on diversity grounds is presumptively outside federal jurisdiction unless a contrary showing is made. See *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 7, 11 (1799). In early diversity cases, the Court applied that presumption vigorously, declining to find jurisdiction (even when it apparently existed) without a proper allegation of diversity in the pleadings. See *Hodgson* v. *Bowerbank*, 5 Cranch (9 U.S.) 303 (1809). The Court also construed statutory grants of jurisdiction narrowly, holding that complete diversity between plaintiffs and defendants was required, *Strawbridge* v. *Curtiss*, *supra*, and that citizens of the territories and District of Columbia were not citizens of a state for purposes of diversity. *Hepburn & Dundas* v. *Ellzey*, 2 Cranch (6 U.S.) 445 (1805); *Corporation of New Orleans* v. *Winter*, 1 Wheat. (14 U.S.) 91 (1816).[23] As the Court remarked in a later case, "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, 292 U.S. 263, 270 (1934).

---

[23] The strict holdings in these cases were somewhat modified by later statutes and cases. See *National Mut. Ins. Co. v. Tidewater Transfer Co.*, *supra*; *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939).

This due regard for state interests has, with narrow exceptions, taken precedence over notions of ease and convenience. Thus, in *City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63 (1941), the Court found that the federal diversity statute required the realignment of parties to the case even though the effect of the realignment was to defeat jurisdiction. The Court emphasized the limited nature of federal jurisdiction over state-law cases, stating: "[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution (article 3)." *Id.* at 76-77, quoting *Healy* v. *Ratta*, *supra*, 292 U.S. at 270. More recently, in *Aldinger* v. *Howard*, 427 U.S. 1 (1976), the Court declined to allow a plaintiff, having filed a federal suit against one defendant, "to join an entirely different defendant on the basis of a state-law claim over which there is no independent basis of federal jurisdiction." *Id.* at 14. The Court noted that a different rule, even if fashioned in the interests of judicial economy, "would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Id.* at 15. See also *Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100 (1981); *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984).[24]

---

[24] Even when the Court has extended jurisdiction, it has cautioned against a wholesale departure from these principles. Thus, for example, while allowing the federal courts to exercise pendent jurisdiction, the Court has advised that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

Petitioners correctly note that the federal courts, without violating Article III, can decide compulsory counterclaims otherwise

Perhaps the most thorough discussion of the inhibitions on federal power took place in the various opinions in *National Mut. Insurance Co.* v. *Tidewater Transfer Co.*, *supra*, where six Justices concluded that Congress could not expand the jurisdiction of the federal courts beyond the limits expressly set out in Article III. Although the plurality opinion of Justice Jackson took the position that Congress could enlarge the jurisdiction of Article III courts by use of its powers under Article I, Justice Rutledge stated: "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded." *Id.* at 605 (opinion concurring in the judgment).[25] Justice Frankfurter agreed, noting that "[b]ut for Article III, the judicial enforcement of rights which only a State, not the United States, creates would be confined to State courts." 337 U.S. at 650 (dissenting opinion). He admonished that a tolerance for expansion of federal jurisdiction would be inconsistent with the "Constitutional scheme for the establishment of the federal judiciary and the distribution of jurisdiction among its tribunals so carefully formulated in Article III . . . ." *Id.* at 651.[26] Justice Vinson, while in accord with Justices Rutledge and Frankfurter on this point, wrote to express his view that there were

---

outside their jurisdiction. But the clear purpose of that rule is to allow more effective exercise of the jurisdiction conferred on Article III tribunals. What petitioners seek here is the opposite: to expand the jurisdiction of a tribunal lying beyond the scope of Article III. To apply the same rule in that context would not advance the interests of Article III, but retard them.

[25] A majority of the Court concluded that citizens of the District of Columbia could sue and be sued in federal court as part of the diversity jurisdiction. It was able to reach that conclusion, however, only because two Justices believed that Article III did not exclude citizens of the District of Columbia from that jurisdiction. The Court, therefore, found jurisdiction by a combination of theories, each of which was rejected by a majority of the Court.

[26] See also Frankfurter, *Distribution of Judicial Power Between State and Federal Courts*, 13 Cornell L. Q. 499 (1928).

"two entirely different principles embodied in Art. III": first, the principle that "the three branches of government established by the Constitution are of coordinate rank" and, second, the principle, "[o]f equal importance," that "the Constitution contains a[n express] grant of power by the states to the federal government, and that all powers not specifically granted were reserved to the states or to the people." *Id.* at 628 (dissenting opinion). Justice Vinson then suggested that the second principle, in particular, argued in favor of a strict adherence to the limits on the judicial power established by Article III. *Id.* at 631-38.

Finally, we note that the Court has made the same basic point in deciding, not whether federal power exists, but how it should be exercised. The most prominent example, of course, is the decision in *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64 (1938), rejecting the authority of the federal courts to create federal common law and overruling *Swift* v. *Tyson*, 16 Pet. (41 U.S.) 1 (1842). The decision in *Erie* rested, at bottom, upon a frank recognition that the interference of federal courts in matters of state law should be severely limited. The Court made clear that the states, not Congress, possessed the basic authority "to declare substantive rules of common law applicable in a state whether they be local in nature or 'general,' be they commercial law or a part of the law of torts." 304 U.S. at 78. In light of that restriction on the federal Legislature, it followed that the federal courts had no inherent power to divine and declare common law applicable in the several states. That understanding, as the Court later observed, "touches vitally the proper distribution of judicial power between state and federal courts." *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945).

The common principle among these varied cases is one of respect for the limits of Article III where state claims are concerned. As we have said, it would be a sharp

departure from those limits to allow non-Article III judges, having less tenure and salary protection than many state judges, to assume power over state claims for the sake of convenience. The Court in *Northern Pipeline* correctly declined to allow such a departure, and it should decline to allow it here.

B. Petitioners Have Not Advanced a Legitimate Basis for Giving Jurisdiction Over State-Law Claims to Judges Unprotected By the Provisions of Article III.

a. In defending the jurisdiction of the Commission over state-law counterclaims, petitioners contend that decisions of this Court allowing the creation of "legislative courts" should be followed in this case. There are several problems with this argument. First, as we have already noted, the case most closely in point (*Northern Pipeline*) reaches the opposite result from that urged by petitioners. Second, as we discuss in the following pages, the cases involving federal rights, whether public or private, do not trigger the same concerns about federalism as cases involving rights arising under state law.

This Court has stated that "[a]ll constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297, 301 (1943); see, e.g., *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272 (1856); *Thomas, supra.*[27] This power does not turn, as such, on whether the right is denominated as "public" or "private." Where the federal right is asserted against

[27] The Court has also held that, "[a]t least in cases in which 'public rights' are being litigated," Congress has greater power to require factfinding without a jury. *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 450 (1977). Respondent argued before the Commission that its assumption of jurisdiction over the counterclaim denied him his right to a trial by jury on that claim. In view of its disposition of the case, the court of appeals did not reach that question. Commission Pet. App. at 19a n.14.

the federal government itself, the Court has taken account of the traditional immunity of the government from such suits, remarking that citizens have no right to sue at all "unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them." *Ex Parte Bakelite Corporation*, 279 U.S 438, 452 (1929). But, even where the rights provided by Congress concern the relationship of one private party with another, and thus raise no question of sovereign immunity, the Court has held that Congress can place their enforcement within the authority of tribunals lacking the characteristics set forth in Article III. See *Thomas supra; Crowell* v. *Benson, supra.*

The power to confer non-Article III jurisdiction over *some* private rights, however, is not the same as power to confer it over *all* private rights. Where federal rights are at issue, as Hamilton recognized in *The Federalist* (see page 19 *supra*), there is no question of displacing preexisting authority in the state courts for the simple reason that no previous federal rights existed. In those cases, therefore, the only real concern under Article III is to maintain a proper regard for the separation of powers. On the one hand, the Court has to assure that Congress does not go too far in immunizing its programs from review by the Judicial Branch; on the other hand, it must take care not to intrude the judicial power into areas generally confided by the Constitution to the other branches. In striking that balance, the Court has recognized that "when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas, supra*, at 337.[28]

[28] The concerns about federalism are also absent from cases in which this Court has acknowledged the power of Congress to

The balance at stake with regard to state-law matters is necessarily very different. In such cases, as here, the central issue is not whether Congress has trespassed upon the judicial powers of the federal government; it is whether Congress has invaded the prerogatives of state governments. As we see it, those prerogatives include the right to have the federal judicial power over state claims exercised, if at all, only in accordance with the limits of Article III. Put another way, the drafters of Article III contemplated that state rights would be adjudicated either by state courts or, in limited circumstances, by federal courts subject to its provisions. Any variation in that structure affects not just the relationship among the branches of the federal government, but the relationship between the federal and state governments as well.

These different considerations, in turn, go directly to the place of a non-Article III tribunal in the constitutional framework. In the first place, the fact that Congress need not create a particular federal right at all creates a natural breathing space for conditions, including procedural conditions, attached to the right. Furthermore, when Congress uses its legislative power to create a right, and provides for a tribunal to adjudicate disputes involving that right, it may be presumed to understand the interplay between the right and the procedure for enforcing it. Congress is thus in a position to assess for itself whether the possibilities of political influence on non-tenured officials, or their lack of legal

---

create special territorial courts, military courts, and courts for the District of Columbia. See, e.g., *Palmore v. United States, supra*; *American Insurance Co. v. Canter*, 1 Pet. (26 U.S.) 511 (1828); *Kendall v. United States*, 12 Pet. (37 U.S.) 524 (1838); *Dynes v. Hoover*, 20 How. (61 U.S.) 65 (1857). In the District of Columbia and in the territories, Congress acts in effect as both the federal and the state government. In such circumstances, the exercise of federal power does not effect a simultaneous withdrawal of power from the states.

training, place the substantive right at risk. If the process proves flawed, Congress can make whatever adjustments are necessary in either substance or procedure to assure that its program is carried out as intended. Thus, where a legislative body creates a right linked to a specified procedure for enforcing it, there are strong reasons for deferring to its judgment in the absence of clear constitutional prohibitions.

These principles cut the opposite way when the power over the right and the power over the procedure lie in different hands. The proper concern in that situation must be to assure that the procedure fashioned by one sovereign does not alter the right fashioned by another. We believe that, at least since *Erie*, such assurance is present when Article III courts decide state-law claims. But we have no similar confidence when the decision is made by temporary officials, drawn from a particular industry and chosen without regard to legal training. At that point, the likelihood of a sure-footed application of state law is sufficiently uncertain to require strict adherence to the structure envisioned by Article III.

The failure to distinguish among the distinctive interests underlying Article III greatly undercuts petitioners' reliance on cases like *Crowell* v. *Benson, supra*, and *Thomas*. In *Crowell*, it is clear that, while the dispute was between private parties, the right at issue was solely one created by Congress. The Court specifically noted that '[t]he act itself, where it applies, establishes the measure of the employer's liability . . .' and that any factual determinations were to be made "in accordance with the prescribed standards." *Id.* at 54.[29] In *Thomas*, the Court expressly considered and rejected

---

[29] Indeed, to assure that the tribunal in that case decided facts only in cases involving rights legitimately derived from Congress, the Court required an Article III court to undertake a more searching review of those facts deemed "a condition precedent to the operation of the statutory scheme." *Id.* at 54-55.

an argument that the matter for decision in the alternative tribunal was one arising under state law. *Id.* at 3335-36. The Court pointed out that "[a]ny right to compensation . . . results from [the federal statute] and does not depend on or replace a right to such compensation under state law." *Id.* at 3335. In addition, the Court noted that "federal law supplies the rule of decision." *Id.* Thus, neither *Crowell* nor *Thomas* posed any question of interference with rights arising from, and determined by, state law.

Petitioners suggest, however, that Congress could make the subject of the counterclaim here into a "federal" or "public" right if it so desired. The point seems to be that, by conferring jurisdiction on a non-article III tribunal, Congress has actually taken a less restrictive course than it would have done by federalizing the law. This argument, of course, depends on the dubious assumption that the authority to do something and the political support to do it are one and the same. But, quite apart from whether Congress can or cannot actually change state law, it is an odd doctrine that would allow Congress to exercise a power it does not have in order to avoid use of one it has. Integral to the Constitution as a whole is the idea that the branches of government act in certain ways and only certain ways. See *INS* v. *Chadha*, 462 U.S. 919 (1983). As the Court made plain in *Chadha*, the Framers intended that "the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951. It is thus one thing for Congress to modify rights under state law openly through the political process; it is quite another for Congress to make them subject to random and inadvertent change through the decisions of a tribunal not invested with Article III protections. See generally, *Byrd* v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958) (nature of tribunal may "bear significantly upon achievement of uniform enforcement of [a] right"). Indeed, if

Article III places fewer restrictions on the tribunals chosen to adjudicate federal rights, it is at least in part because Congress has enacted those rights through exercise of its legislative power. The same rule should not apply when Congress has enacted the procedure without the substance.

Petitioners also make a point of noting that a losing party before the Commission has a right of appeal to an Article III court. If this fact is meant to suggest that the Commission can be treated as an "adjunct" to an Article III court, similar to a magistrate or special master, the suggestion is unpersuasive. The federal courts have no role in establishing or supervising the Commission, which functions solely according to a grant of authority from Congress. Viewed objectively, the Commission is nothing more or less than a separate adjudicatory body, asserting jurisdiction over both federal and state claims, whose decisions are subject to review and enforcement in Article III courts. That modest contact with the traditional exercise of federal power hardly transforms the Commission into a part of the structure contemplated by Article III.

If petitioners instead intend to suggest that a right of appeal to an Article III court cures the ills of an initial proceeding before the Commission, that suggestion is equally unpersuasive. In the first place, the plurality opinion in *Northern Pipeline* dismissed the same argument in strong terms, noting: "Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level." 458 U.S. at 86 n.39. In any event, however, the right of appeal from the Commission hardly leaves a litigant in a position comparable to that of one proceeding initially

in an Article III court. The statute provides that entry into federal court depends upon the posting of a sizeable bond in satisfaction of the judgment rendered by the Commission. 7 U.S.C. § 18(e). Moreover, the appealing party must overcome a balance tilted in favor of his opponent by virtue of the Commission proceedings. Appellate review, at best, is an incomplete remedy for the primary exercise of jurisdiction by a non-Article III tribunal like the Commission.

b. Petitioners also contend that the Commission was entitled to exercise jurisdiction over the state-law counterclaim in this case because respondent consented to that jurisdiction. In our view, this argument is incorrect for two reasons. First, the consent of litigants is not enough to override the judicial structure contemplated by Article III. Second, respondent did not, in fact, consent to adjudication of the counterclaim by the Commission.

Although the Commission treats the issue here as involving only a "personal right" that can be waived, Commission Br. at 33, that analysis trivializes the purpose of Article III. As the history of Article III quite clearly shows, the intent of the drafters was to establish an independent federal judiciary and to confer upon it the power to decide certain narrowly defined classes of cases and controversies. See pages 17-23 *supra*. That intent had to be carried out against a background of fears that the judiciary would usurp powers both of the state courts and of the coordinate branches of the federal government. Thus, the federal judicial power was given and withheld for reasons that implicate the proper balance of power between and among governments and their branches. That balance is important for reasons that have nothing to do with the wishes of the litigants in any particular case.

The well-recognized rule is that "the parties cannot waive lack of jurisdiction by express consent, or by con-

duct, or even by estoppel; the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 Wright & Miller & Cooper, *Federal Practice and Procedure* § 3522, at 66-68 (1984). Following this reasoning, the Court in *Glidden Co.* v. *Zdanok*, *supra*, declined to find a waiver of the right to raise challenges to jurisdiction based upon Article III.[30] The plurality opinion of Justice Harlan (with no dissent on this issue) indicated that the Court would not find waiver "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business . . . ." *Id.* at 535-36. The opinion then pointed out that this principle applied with even greater force "when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536. Justice Harlan conceded that the rule was a disruption to the normal appellate process but concluded: "[T]hat is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has concluded on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court." *Id.* at 536-37. See also *Mansfield, C & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379 (1884).

The inability of the litigants to ignore limitations embodied in Article III does not mean that they cannot consent to less formal procedures within and without Article III. It may well be, as numerous courts of appeals have

---

[30] In *Glidden*, the litigants in two cases had failed to present an Article III challenge to certain judges on their appellate panels, sitting by designation from the Court of Customs and Patent Appeals and the Court of Claims, until after they received an unfavorable decision on the merits. 370 U.S. at 535.

found, that litigants can consent to the use of magistrates employed by Article III judges as an aid to their own jurisdiction. See, e.g., *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985); *Wharton-Thomas* v. *United States*, 721 F.2d 922 (3d Cir. 1983). Moreover, litigants may agree to have their disputes resolved outside of the judicial process altogether, by arbitrators or other decisionmakers. Nothing in the history or structure of Article III indicates that resort to these sorts of alternatives is necessarily inconsistent with the expectations underlying the grant of federal power. But it is very different when Congress establishes a separate tribunal, with officials chosen and approved by the Legislative and Executive Branches, and gives that tribunal power over state-law claims without the independence of tenure and salary protection. The consent of the litigants does not make that departure from the constitutional design permissible.

Even if consent were enough, however, it does not exist here. Although respondent did bring his own claim before the Commission, he opposed the assertion of jurisdiction over the counterclaim. Commission Pet. App. at 37a. Moreover, unlike the situation before the Court in *Glidden Co.* v. *Zdanok*, *supra*, he did so before any decision on the merits of that counterclaim was made. He has maintained that position in the court of appeals and now before this Court.

It is a curious use of language to call this express and determined resistance by the term "consent." Indeed, it is hard to see just what respondent could have done to make his objection to jurisdiction more clear. While it is true that filing his claim elsewhere would have avoided the question entirely, it hardly follows that respondent by not doing so agreed to something with which he explicitly disagreed.[31] Thus, if consent means a voluntary acceptance of jurisdiction over the counterclaim, respondent did not give his consent in this case.

[31] The court of appeals exhibited a serious doubt about the power of Congress to condition access to the Commission for federal claims on waiver of Article III protections for state claims. In other settings, the Court has struck down the enforced linkage of a government benefit and the surrender of a constitutional right. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972); *Branti v. Finkel*, 445 U.S. 507 (1980). The court of appeals, noting that Commission rules put respondent to an all-or-nothing choice, was unable to find "the carefully guarded, cost-free consent the Ninth Circuit declared 'essential to the constitutionality of the [Magistrates] Act." Commission Pet. App. at 38a-39a, quoting *Pacemaker Diagnostic Clinic of America, Inc. v. Intromedix, Inc.*, 725 F.2d 537, 546 (9th Cir. 1984) (en banc).

Realistically viewed, petitioners' argument is really not about consent at all, but about involuntary waiver or, perhaps, estoppel. But it is even less fitting to allow departures from Article III based upon waiver than it is upon consent. The theory of consent, at a minimum, has the virtue of allowing to the parties the decisionmaker that they willingly sought and accepted. But the idea of waiver (as advanced here) forces upon one party the decisionmaker that, with regard to the claim at issue, he vigorously opposed. Whatever stretching of Article III is thought necessary to accommodate truly voluntary agreements about jurisdiction, that flexibility should not be extended to cases in which jurisdiction is asserted against the will of one party.[32]

[32] This case would be a particularly inappropriate one in which to find waiver based upon the filing of respondent's own claim before the Commission. At the time that respondent filed the claim in 1980, it was unsettled whether customers had a private right of action under the Commodity Exchange Act. Although this Court recognized such a right in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), the opinions in that case (decided two years later) make clear how open to question the existence of that right was. Had respondent chosen to proceed to federal court, therefore, he would have faced a significant risk that his claim ultimately would have been barred on the ground that the Commission had exclusive jurisdiction.

This analysis does not leave litigants in a position to have their cake and eat it too. Congress can provide that, where a state-law counterclaim is present, the Commission should decline to exercise its jurisdiction over the entire case. Indeed, that is precisely the course now followed by the Commission whenever the counterclaim has already been asserted in federal court. In such cases, as the Commission notes in its brief (at 26 n.15), the Commission will not proceed upon a reparations complaint filed against a broker who has a pending counterclaim in federal court. Thus, the role of Article III courts in cases involving state-law claims can be preserved by extension of an existing Commission practice.

c. A decent regard for the principles of Article III will not, as petitioners foretell, prove an impossible burden for the federal courts. Their policy arguments based on convenience, therefore, even if they are properly part of Article III analysis, are considerably overwrought.

We note, at the outset, that Congress did not intend to commit all actions arising under the statute to the Commission. Quite apart from the presence or absence of state-law counterclaims, it did not bar litigants from bringing their claims to federal court. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, *supra*. Moreover, as just discussed, the Commission defers to the jurisdiction of the federal courts whenever a counterclaim is already pending there. It is thus apparent that either a customer or a broker can bypass the Commission, as matters now stand, without defeating the congressional scheme.

Although petitioners stress that the Commission provides a quicker, more efficient, and less costly method of adjudication than do Article III courts, there is less to that point than meets the eye. Taken at face value, it is really a complaint that, in setting out the plan for federal courts, the drafters of Article III chose a structure that is slower, less efficient, and more costly than petitioners find expedient. Even if that were true, it would

not provide grounds for disregarding that choice. But, in fact, it is not true: the minimal requirements of Article III leave ample room for congressional action that will reduce the burdens faced by the federal courts.

This action can take any number of forms. To begin begin with, Congress can modify the existing jurisdiction of the federal courts by, for example, placing greater reliance on alternative forums for cases involving only federal rights,[33] or by diminishing or withdrawing the jurisdiction of federal courts in diversity cases. Or Congress can adopt less formal procedures for certain types of cases in the federal courts; nothing in Article III requires that every case be pursued according to the Federal Rules of Civil Procedure. Finally, Congress can grant tenure and salary protection to officials on the Commission and similar adjudicatory bodies, assuring them the independence called for in Article III without altering the procedures already in place for cases brought before them. Whether or not these choices are desirable as a matter of policy, they do not involve a departure from the limitations imposed by Article III.

There are many things that Congress can do to address the problem of overcrowded federal courts. What Congress cannot do, and what is at issue in this case, is to put state-law claims within the jurisdiction of officials without the independence assured by tenure and salary protection. That alteration in the use of federal judicial

---

[33] There is thus considerable doubt that limiting the power of non-Article III courts over state-law claims would frustrate efforts to relieve the federal courts, as petitioners contend. At the same time, it should be recognized that the widespread creation of non-Article III courts is not an unmixed blessing. As the history of Article III shows, the plan incorporated into that Article represented a balance of complex and important governmental interests, dividing powers among competing sovereigns and among parts of the same sovereign. Those interests will not necessarily be served so well by tribunals that offer convenience but lack the stature and independence of the traditional federal courts.

power exceeds the limits set, after much controversy, in the provisions of Article III nearly 200 years ago.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel:
H. BARTOW FARR III
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

LESLIE J. CARSON, JR.
1004 Robinson Building
42 South 15th Street
Philadelphia, PA 19102
(215) 568-1587
Attorney for Respondents